Supreme Court, U.S.
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No. 02-1275

In the Supreme Court of the United States

CONTINENTAL INSURANCE COMPANY,
Petitioner,

v.

VIAD CORP AND ALLIANZ INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Continental Insurance Company respectfully submits this reply to the Brief in Opposition filed by Respondents Viad Corp and Allianz Insurance Company.

ARGUMENT

Viad and Allianz attempt to portray this case as a "garden-variety contract dispute."[1] Indeed, it is a dispute arising from a contract with an arbitration clause. But it is also more than that. This case presents an important question about the federal law of arbitrability and the enforcement of federal court judgments.

In 1984, the district court "so ordered" a settlement agreement that released Continental from all claims arising out of the original contract (the "R&A Agreement"), but 16 years later, Viad and Allianz tendered such claims against Continental. Continental returned to the district court to enforce the settlement agreement.[2]

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[1] Opposition Br. at 1.

[2] The parties always have agreed that the settlement agreement incorporated the mutual releases exchanged by the parties. *See* Allianz and Viad's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment at 14 ("[T]he Stipulation and Order and releases must be read together even though they were not executed at the same time."). New York contract law

The district court, however, refused to decide whether the settlement agreement released Continental from responsibility to handle the claims arising from the R&A Agreement. The district court held, and the Second Circuit agreed, that whether the "so ordered" settlement agreement released Continental – in other words, the meaning and effect of the district court's own judgment – was for an arbitration panel, not the court, to decide.

Thus, Continental's Petition presents an important question of federal law:

> Under the Federal Arbitration Act, in a dispute arising from an agreement with an arbitration clause, who must determine the legal effect of a federal court judgment ending an earlier dispute between the parties – an arbitration panel, or the federal court that issued the judgment?

Viad and Allianz do not dispute the formulation of the question presented, or that it involves an important question of the federal law of

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provides that "all writings forming part of a single transaction are to be read together." *This Is Me v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998); *see also Mayo v. Royal Ins. Co. of N. Am.*, 662 N.Y.S.2d 654, 655 (App. Div. 1997) ("The stipulation of settlement cannot be examined apart from the release that accompanied it.").

arbitrability. Rather, they argue that this case actually does not present this question. They further argue that this case does not fall within the split in the circuits on the question of whether the meaning and effect of a federal court judgment is arbitrable because this case involves a "so ordered" or court-approved settlement rather than a litigated judgment. As demonstrated below, their arguments are wrong.

I. The Decision Below Presents the Question Described in the Petition Because the District Court and the Second Circuit Held That the Meaning and Effect of the 1984 "So Ordered" Settlement Agreement Is Arbitrable and Therefore Must Be Arbitrated.

Viad and Allianz contend that the question described in the Petition is not presented in this case because both the district court and the Second Circuit interpreted and enforced the 1984 settlement agreement by sending the controversy to arbitration once they determined that the arbitration clause was intact.[3]

The decision that the arbitration clause was still intact, however, did not address the issue that Continental placed before the district court: *Whether the "so ordered" settlement agreement released Continental from obligations to handle claims arising from the R&A Agreement.* The district court

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[3] Opposition Br. at 5-7.

left that issue to an arbitration panel by granting Allianz and Viad's motion to compel arbitration. *See* App. 16 ("[T]he arbitration clause requires that the effect of the 1984 Releases on [Continental's] liability for IBNR claims must be decided by an arbitrator."). The Second Circuit affirmed and indeed held that once the district court had determined the "threshold question of arbitrability of claims," the district court could not "pass upon the merits" of Continental's claim that the 1984 settlement agreement released it from further liability under the original contract. (App. 5).[4]

If, as Viad and Allianz claim, the Second Circuit and the district court had determined whether the "so ordered" settlement agreement had released Continental's obligations under the original contract, there would have been no need to compel

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[4] Viad and Allianz quote the Second Circuit's statement that the district court interpreted the settlement agreement "as not having extinguished ... the underlying obligations of the R&A Agreement." (App. 4). The Second Circuit was referring to dicta by the district court, however. Although the district court expressed doubt that the settlement agreement extinguished the underlying obligations of the R&A Agreement, *see* App. 16, the district court did not actually decide that issue. Rather, that was the very question that the district court sent to arbitration, as the district court itself recognized: "Therefore, the arbitration clause requires that the effect of the 1984 Releases on the liability for the IBNR claims must be decided by an arbitrator." (App. 16-17).

arbitration. The only purpose for the arbitration was to answer the question that the district court punted, and which the Second Circuit held that the district court was *obligated* to punt: whether the "so ordered" settlement agreement released Continental's obligations under the original contract.

The question presented in the Petition thus asks whether, notwithstanding the presence of an intact arbitration clause, the meaning and effect of the 1984 "so ordered" settlement agreement must be arbitrated rather than decided by the so-ordering court. The decision below squarely presents this question, because the Second Circuit held that it must be arbitrated. This Court should review and reverse that answer.

II. The Circuits Are Divided on Whether the Meaning and Effect of a "So Ordered" Settlement Agreement Is Arbitrable.

Viad and Allianz argue that the Second Circuit's "decision arises from the court's application of New York state contract law."[5] The Second Circuit's decision, however, does not cite a single New York state court case.[6] The Second Circuit's

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[5] Opposition Br. at 6.

[6] The district court opinion did cite *Schlaifer v. Sedlow*, 51 N.Y.2d 181 (1980), for the proposition that a general release does not *cancel* an arbitration clause. (App. 15). That proposition of New York state law, however, is not challenged by the Petition,

decision explicitly rests entirely on the federal law of arbitrability, and, indeed, is entirely consistent with earlier Second Circuit decisions. Those holdings, however, conflict directly with decisions of the Third, Fourth, Eighth, and Eleventh Circuits. Viad and Allianz's attempts to cloud this direct circuit split or to place this case outside the split are unavailing.

Viad and Allianz claim that the conflict between the circuits is limited "to the question of who, as between a court and an arbitration panel, should decide the *res judicata* or collateral estoppel effect of a prior federal court judgment on a subsequent arbitration."[7] Put more directly, Viad and Allianz claim that the circuit split is limited to the arbitrability of the preclusive effect of *litigated judgments*. This is demonstrably false.

In reality, the circuit split extends to the arbitrability of the meaning and effect of *"so ordered" or court-approved settlement agreements*, as is made clear by *In re Y&A Securities Litigation*, 38 F.3d 380 (8th Cir. 1994):

> In April 1993, the district court entered a final judgment incorporating a negotiated settlement of these [claims]. *As will be seen, the scope of this consent judgment – and specifically whether*

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which assumes that the arbitration clause was left intact by the settlement agreement.

[7] Opposition Br. at 8.

> *Valk's claims against Dean Witter were released thereby – lies at the heart of this appeal.*

Id. at 381 (emphasis supplied). The Eighth Circuit then went on to hold that under the federal law of arbitrability, "[t]he district court, and not the arbitration panel, is the best interpreter of its own judgment. . . . [W]e hold that the district court had the power to grant the motion for an injunction against the arbitration." *Id.* at 383.

In *Y&A*, there was no dispute that the arbitration clause was intact. Yet the Eighth Circuit decided that the *district court* – not an arbitration panel – must determine whether the "so ordered" settlement agreement released the claims at issue. The Eighth Circuit held that the meaning and effect of a "so ordered" settlement agreement is *not* arbitrable. In this case, the Second Circuit reached precisely the opposite result and held that the meaning and effect of the 1984 "so ordered" settlement agreement *is* arbitrable.[8]

Thus, the circuit split is not limited to the arbitrability of *res judicata* or collateral estoppel

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[8] The assertion by Viad and Allianz that the Second Circuit's holding will not have far-reaching consequences because it is unpublished ignores that, in this case, the Second Circuit merely applied its established rule that the effect of a district court's prior judgment is arbitrable. *Nat'l Union Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996).

effects stemming from a *litigated* federal court judgment. Rather, it extends to the arbitrability of the meaning and effect of "so ordered" or court-approved settlement agreements.

Another example is *In re American Honda Motor Co.*, 315 F.3d 417, 438 (4th Cir. 2003), in which the Fourth Circuit held that the interpretation of a *court-approved settlement agreement* was not arbitrable, and affirmed the district court's injunction against enforcement of an arbitration award that purported to interpret the court-approved settlement agreement. Similarly, in *Telephone Workers Union of New Jersey v. New Jersey Bell Telephone Co.*, 584 F.2d 31, 23-33 (3d Cir. 1978), the Third Circuit held, in a case involving the district court's enforcement of a *consent decree*, that "[w]hen a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment." The Third Circuit recently reaffirmed that holding in *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132, 138 (3d Cir. 1998).

Thus, the circuits are divided over whether the meaning and effect of a federal court *judgment* is arbitrable, regardless of whether the meaning and effect stems from preclusion doctrines (in the case of litigated judgments) or from the specific terms of a consent decree or other court-approved settlement agreement. The Second and Ninth Circuits hold that the meaning and effect of a prior judgment is arbitrable and must be determined by an arbitration

panel, while the Third, Fourth, Eighth, and Eleventh[9] Circuits hold that the meaning and effect of a prior judgment is not arbitrable must be determined by the court that issued it. This case fits directly within the circuit split.

Remarkably, Viad and Allianz assert that it is "questionable whether a circuit split even exists regarding this question."[10] The circuits themselves recognize that a split exists. In *Olick*, the Third Circuit examined the split. It noted that the Fourth, Eighth, and Eleventh Circuits came down on one side of the split while the Second Circuit came down on the other. (The Third Circuit went on to side with the majority.) *Id.* at 137-38. Similarly, in *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1132-34 (9th Cir. 2000), the Ninth Circuit expressly considered and rejected the holdings of the Eighth and Eleventh Circuits, while praising the Second Circuit rule.

Viad and Allianz's misapprehension of the breadth of the circuit split manifests in their claim that the question presented does not have far reaching implications. They claim that "Continental's parade of horribles could easily have been averted by the parties in this case, or in future cases. Parties seeking to extinguish their obligations to arbitrate need only agree expressly to rescind

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[9] *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067 (11th Cir. 1993).

[10] Opposition Br. at 8 n.3.

their arbitration agreement."[11] First, that assertion implicitly concedes that the Second Circuit's decision *does* result in a "parade of horribles." Second, the parties in this case *did* take steps to avoid a "parade of horribles" by having the settlement agreement "so ordered" by the district court, thereby converting it into a federal judgment; the rule of the Second and Ninth Circuits renders that choice meaningless. Finally, even if the assertion were true in cases involving court-approved settlement agreements, it is not true in cases involving litigated judgments or confirmed arbitration awards, which also are within the scope of the split (and the question presented). Parties to litigated judgments or confirmed arbitration awards do not have the opportunity to include language expressly terminating an arbitration clause. Judges and arbitration panels dictate the language of those judgments.

Under the Second Circuit rule, the meaning and effect of *all* judgments – litigated judgments, confirmed arbitration awards, and "so ordered" or court-approved settlement agreements – is left to an arbitration panel to decide. The rule in the Third, Fourth, Eighth, and Eleventh Circuits is different, and this Court should hear this case to determine which circuit has correctly stated the law.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

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[11] Opposition Br. at 10.

Respectfully submitted,

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